05-1555

Supreme Court, U.S.
FILED
JUL 3 - 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

KRISHNA MAHARAJ,

Petitioner,

—v.—

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS FOR THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND IN SUPPORT OF PETITIONER KRISHNA MAHARAJ

SAUL P. MORGENSTERN
Counsel of Record
JOHN J.P. HOWLEY
KAYE SCHOLER LLP
425 Park Avenue
New York, New York 10022
(212) 836-8000

Counsel for Amicus Curiae
The Government of the United Kingdom of Great Britain and Northern Ireland

July 3, 2006

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
REASONS FOR GRANTING THE PETITION	2
I. Consular Notification Rights and Obligations in the Bilateral Treaty Are Mandatory and Unequivocal	4
II. Consular Notification Requirements in the Bilateral Treaty Were Violated in the Case of Mr. Maharaj	5
III. The Appropriate Remedy for this Clear Violation of the Bilateral Treaty is Review and Reconsideration .	6
Conclusion	11

TABLE OF AUTHORITIES

Cases: PAGE

Avena Case (Mexico v. United States of America), 2004 I.C.J. 128 (Mar. 31, 2004) 7, 8, 9, 10

Bell v. True, 413 F. Supp. 2d 657 (W.D. Va. 2005) 10

Breard v. Greene, 523 U.S. 371 (1998) 10

LaGrand Case (Germany v. United States), 40 I.L.M. 1069 (2001) 6, 7, 8, 9, 10

Samad v. The Etivebank, 134 F. Supp. 530 (E.D. Va. 1955) 3

The Paquete Habana, 175 U.S. 677 (1900) 9

United States v. Pink, 315 U.S. 203 (1942) 3

Sanchez-Llamas v. Oregon, Nos. 04-10566 and 05-51, 548 U.S. ___ (2006) 9-10

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Government of the United Kingdom of Great Britain and Northern Ireland (the "United Kingdom") respectfully submits this brief as *amicus curiae* in support of petitioner Krishna Maharaj's petition for review of the denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Counsel for Petitioner and counsel for Respondent consent to the filing of this brief. Copies of their written consents are attached to this brief at Appendix A.

Petitioner Krishna Maharaj is a national of the United Kingdom who has raised issues concerning the interpretation and enforcement of the *Consular Convention between His Majesty in respect of the United Kingdom of Great Britain and Northern Ireland and the President of the United States of America*, dated June 6, 1951, 3 U.S.T. 3426 (the "Bilateral Treaty"). As a State Party to the Bilateral Treaty, the United Kingdom submits this brief *amicus curiae* to provide the Court with an understanding of the rights and obligations under the treaty, precedent relevant to the implementation and interpretation of the treaty, the effects of the treaty in the context of customary international law, and the remedies provided for breach of the treaty. This *amicus curiae* submission serves the important purposes of informing the Court of a State Party's understanding of the meaning of the Bilateral Treaty, and allowing the State Party an opportunity to be heard in judicial proceedings involving one of its nationals.

---

[1] In accordance with Supreme Court Rule 37.6, *amicus* represents that no party other than *amicus* and counsel for *amicus* authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Bilateral Treaty requires that a State Party immediately notify a foreign national's consular representative of the national's arrest or detention. The plain language of the Bilateral Treaty makes clear that the consular notification requirement is mandatory, not subject to waiver by the detained foreign national, and not dependent on the need or desirability of such notification. Specifically, Article 16 of the Bilateral Treaty states: "A consular officer shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district. A consular officer shall be permitted to visit without delay, to converse privately with and arrange legal representation for, any national of the sending state who is so confined or detained."

The appropriate remedy for breach of the consular notification obligations in the Bilateral Treaty is review and reconsideration in the context of the nature of the rights violated and the legal consequences of the violation. In determining the means for review and reconsideration, the United Kingdom submits that the mandatory and unqualified nature of the right to consular notification must be considered. Such clear and unequivocal language in a treaty requires a remedy that is equally clear and unequivocal. The United Kingdom therefore invites the Court to consider that, under the Bilateral Treaty, review and reconsideration should be accomplished by ordering a new trial.

REASONS FOR GRANTING THE PETIITON

The Petition filed by Krishna Maharaj raises questions concerning, *inter alia*, interpretation and enforcement of

the *Consular Convention between His Majesty in respect of the United Kingdom of Great Britain and Northern Ireland and the President of the United States of America*, dated June 6, 1951, 3 U.S.T. 3426 (the "Bilateral Treaty"). The Bilateral Treaty requires that a consular officer of the United Kingdom be informed immediately when a U.K. national is confined in prison awaiting trial or otherwise detained in custody in the United States, and that the consular officer be permitted to visit without delay, and to converse privately with and arrange legal representation for any national so confined or detained. It is undisputed that in violation of these provisions of the Bilateral Treaty, the United Kingdom was never advised of Mr. Maharaj's detention, confinement, trial or conviction. The United Kingdom learned of Mr. Maharaj's conviction through a third party only after his sentencing.

The Bilateral Treaty was signed by the President of the United States of America on September 8, 1952 and was ratified by the United States Senate on June 13, 1952. *See* Treaties and Other International Acts series 2494, Department of State Publication 4729. It became effective as of September 7, 1952. *Id.*; *see also Samad v. The Etivebank*, 134 F. Supp. 530, 546 n.1 (E.D. Va. 1955). As a Treaty signed by the President and ratified by the U.S. Senate, the Bilateral Treaty is part of the Supreme Law of the United States. *See* U.S. Constitution, Art. VI ("all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land"). Officials of individual state governments are, therefore, bound to enforce and comply with such treaties. *See, e.g., United States v. Pink*, 315 U.S. 203, 230-31 (1942).

I. Consular Notification Rights and Obligations in the Bilateral Treaty Are Mandatory and Unequivocal.

Article 16 of the Bilateral Treaty states, in unequivocal and mandatory terms, that: "A consular officer *shall* be informed *immediately* by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district. A consular officer *shall* be permitted to visit without delay, to converse privately with and arrange legal representation for, any national of the sending state who is so confined or detained."

The United Kingdom considers that the international treaty obligations relating to consular notification and access are of vital importance for both the protection of individuals and the maintenance of good interstate relations. Consular notification is required as it enables a representative of the government of a detained national to provide consular assistance to that national. While a state is unaware of the detention of one of its nationals, because of the failure of the detaining state to provide the requisite consular notification, both the detained foreign national and the State Party to the treaty effectively lose all rights provided by the treaty. The United Kingdom considers compliance with the consular notification provisions of the Bilateral Treaty to be mandatory and of the utmost importance. This is evident from the United Kingdom's Police and Criminal Evidence Act of 1984, Code of Practice C, which provides in Section 7.2 that "the appropriate High Commission, Embassy or Consulate *shall* be informed as soon as practicable." (emphasis added). The only exception is for a detainee who is a "political refugee." *Id.* §§ 7.2, 7.4.

The U.S. government shares this view of the Bilateral Treaty as evidenced by its "Instructions for Federal,

State, and Other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them" (available at http://travel.state.gov/law/consular/consular_636.html). Page 5 of this U.S. State Department document lists the United Kingdom under the heading "Mandatory Notification Countries and Jurisdictions." The instructions to Federal and State law enforcement authorities state, on page 4, "if the foreign national's country is on the list of mandatory notification countries on the next page" then the law enforcement authorities must "[n]otify that country's nearest consular officials, without delay, of the arrest/detention." The instructions also provide a statement that must be read to the foreign national which further illustrates the U.S. government's understanding of the mandatory nature of the consular notification requirement. On page 7 of the U.S. State Department's instructions, law enforcement authorities are directed to advise detained British nationals as follows: "Because of your nationality, *we are required to notify your country's consular representatives* here in the United States that you have been arrested or detained." (emphasis added). Thus, it is plain that both signatories to the Bilateral Treaty—the United States and the United Kingdom—consider the consular notification provisions to be mandatory, not subject to waiver by the detained foreign national, and not dependent on any assessment of need or desirability of such notification.

II. Consular Notification Requirements in the Bilateral Treaty Were Violated in the Case of Mr. Maharaj.

Mr. Maharaj is a British national. In his case, there was a clear breach of the requirement in Article 16 of the Bilateral Treaty to notify immediately the relevant United Kingdom consular official of Mr. Maharaj's

arrest and detention. Indeed, it is undisputed that United States and Florida authorities failed to notify British consular officers of the arrest, detention, and trial of Mr. Maharaj.

Mr. Maharaj was arrested on October 16, 1986 and charged with murder. His trial for murder took place between October 5 and December 1, 1987, and he was convicted and sentenced to death.[2] No official of either the State of Florida or the United States of America ever informed any official of the United Kingdom of Mr. Maharaj's arrest, detention, prosecution or conviction. The consular staff at the U.K. Consulate-General in Atlanta (the consular district in which Mr. Maharaj was arrested and detained) only became aware of Mr. Maharaj's situation on October 27, 1988, when they were informed by a third party that Mr. Maharaj was in prison.

III. The Appropriate Remedy for this Clear Violation of the Bilateral Treaty is Review and Reconsideration.

Under the international law of treaties and the international law of state responsibility, the appropriate remedy for violation of consular notification obligations in a treaty is review and reconsideration of any resulting conviction and sentence.

The importance of review and reconsideration under international law is evident from the International Court of Justice's decision in the *LaGrand Case (Germany v. United States)*, 40 I.L.M. 1069 (2001) (available on Westlaw at 2001 WL 34607609). In *LaGrand*, the United States "acknowledged that, in the case of the LaGrand

---

[2] Mr. Maharaj's sentence was subsequently vacated and he was re-sentenced to two consecutive terms of 25 years imprisonment and one consecutive term of two years imprisonment without parole.

brothers, it did not comply with its obligations to give consular notification" under a multilateral treaty, the Vienna Convention on Consular Relations (1963), to which Germany was a State Party. *Id.* ¶ 123. In a proceeding brought by Germany against the United States, the International Court of Justice determined that this failure to provide consular notification constituted a breach of the multilateral treaty. *Id.* ¶ 125. The International Court of Justice further determined that two remedies were warranted. First, the Court rejected the notion that an apology would be sufficient and looked to whether the United States had taken "specific measures" to ensure performance of its obligations under the treaty in the future. *Id.* ¶ 124. Second, the Court determined that, "in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties . . . . it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking into account the violation of the rights set forth in the Convention." *Id.* ¶ 125.

The International Court of Justice reaffirmed the requirement of review and reconsideration as a remedy for treaty violations in its recent decision in the *Avena Case (Mexico v. United States of America)*, 2004 I.C.J. 128 (Mar. 31, 2004) (available on Westlaw at 2004 WL 2450913). In *Avena*, the Court found that the United States had breached its treaty obligations by not advising Mexican nationals of their rights under the Vienna Convention, and by not notifying the appropriate Mexican consular post without delay of the detention of Mexican nationals. *Id.* ¶ 153(4) and (5). As in its decision in the *LaGrand Case*, in *Avena* the Court found that the appropriate remedy for these violations was "review and reconsideration of the convictions and sentences of the Mexican nationals." *Id.* ¶ 154(9).

Although the *Avena* case and the *LaGrand* case involved an interpretation of the Vienna Convention on Consular Relations, in fashioning an appropriate remedy the Court relied in both cases on well-established principles of international law that apply with equal force to violations of the Bilateral Treaty at issue in Mr. Maharaj's case. Specifically, the ICJ relied upon a well-settled " 'principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.' " *Avena* ¶ 119 (quoting *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9,* p. 21). While noting that what constitutes "reparation in an adequate form" will depend on the particular circumstances of each case, the ICJ emphasized that the "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." *Id.* (quoting *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17,* p. 47). In the case of a violation of obligations under a treaty requiring consular notification, the ICJ has now twice held that this can be accomplished only by review and reconsideration of the conviction and sentence. *Avena* ¶ 120; *LaGrand* ¶ 125 ("it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the [treaty]").

Further authority for the remedy of review and reconsideration of Mr. Maharaj's conviction and sentence is found in the customary international law of state responsibility as evidenced, *inter alia*, by the United Nations' International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, together with their Commentaries. *See* Annex to UN General Assembly Resolution A/RES/56/83, December 21, 2001. Article 35 of these Articles provides: "A State

responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed . . . ."[3] This fundamental principle of international law is also incorporated into U.S. law. *See The Paquete Habana*, 175 U.S. 677, 700 (1900) (customary international law "is part of our law").

In the context of its decisions providing remedies for violations of the Vienna Convention, the ICJ declined to impose a presumption that "partial or total annulment of the conviction or sentence provides the necessary and sole remedy." *See Avena* ¶ 123. Rather, the Court determined that the United States must provide review and reconsideration of the convictions and sentences "by means of its own choosing." *Id.* ¶ 131. The Court emphasized, however, that the "means" selected must be meaningful taking into account both the nature of the rights violated and the legal consequences of the violation:

> "It should be underlined, however, that this freedom in the choice of means for such review and reconsideration is not without qualification: as [the *LaGrand Case*] makes abundantly clear, such review and reconsideration has to be carried out 'by taking account of the violation of the rights set forth in the [treaty]' (*I.C.J. Reports 2001*, p. 514, para. 125), including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation."

Avena ¶ 131.

Courts in the United States have acknowledged that ICJ opinions and judgments are entitled to "respectful consideration." *Sanchez-Llamas v. Oregon*, Nos. 04-

---

[3] Two provisos to this obligation are then set out, neither of which are applicable in this case.

10566 and 05-51, slip op. at 18, 548 U.S. ___ (June 28, 2006); *see also Breard v. Greene*, 523 U.S. 371, 375 (1998) (U.S. courts "give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret [it]"); *Bell v. True*, 413 F. Supp. 2d 657, 730 (W.D. Va. 2005) ("consideration must be given to international case law interpreting the [Vienna Convention on Consular Relations]."). Specifically, U.S. courts have acknowledged that the ICJ's decisions in *LaGrand* and *Avena* have set forth the remedy (i.e., "review and reconsideration") under international law for violations of the consular notification obligations of the Vienna Convention. *See Bell*, 413 F. Supp. 2d at 730 (reasoning that *Avena* obliges the U.S. to permit detainees to raise Article 36 claims in domestic courts).

In determining the means for review and reconsideration, therefore, the United Kingdom submits that the nature of the rights and violations in question must be considered. The rights set forth in the Bilateral Treaty are mandatory and unqualified. The United States and the State of Florida had a clear and unambiguous obligation to inform United Kingdom consular officials "immediately" of Mr. Maharaj's arrest and detention. *See* Bilateral Treaty, Art. 16.

Such clear and unequivocal language in a treaty requires a remedy that is equally clear and unequivocal. Therefore, the United Kingdom invites the Court to consider that, in this case, review and reconsideration should be accomplished by ordering a new trial.

Conclusion

For all the foregoing reasons, the United Kingdom respectfully requests that the petition be granted.

Dated: New York, New York
July 3, 2006

Respectfully submitted,

SAUL P. MORGENSTERN
Counsel of Record
JOHN J.P. HOWLEY
KAYE SCHOLER LLP
425 Park Avenue
New York, New York 10022
(212) 836-8000

Counsel for Amicus Curiae
The Government of the United
Kingdom of Great Britain
and Northern Ireland